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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

DALE FOLTZ,

Petitioner,

- VS -

WILLIAM BLACKBURN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDIX –

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QUESTION PRESENTED

WHETHER A CLEAR MISAPPLICATION OF THE PRINCIPLES OF *STRICKLAND* v *WASHINGTON*, 466 US 668 (1984) REQUIRES SUMMARY REVERSAL OF A DECISION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT GRANTING RESPONDENT'S REQUEST FOR HABEAS CORPUS RELIEF?

EDITOR'S NOTE

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit was filed September 17, 1987, and is reported at __ F2d __ (1987). The decision of the United States District Court, Eastern District of Michigan, Southern Division, was filed on August 8, 1986. The decision of the Magistrate for the United States District Court, Eastern District of Michigan, Southern Division, was filed March 21, 1985. The order of the Supreme Court for the State of Michigan was filed November 19, 1980. The decision of the Court of Appeals for the State of Michigan was filed January 9, 1980. Copies of these opinions are included in the Appendix to this Petition.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was filed September 17, 1987. An order staying the mandate was filed November 3, 1987. The jurisdiction of this Court is invoked under 28 USC 1254(1). The decision of the Court of Appeals for the Sixth Circuit is based on *Strickland* v *Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision this Petition involves is the Due Process Clause, which is:

> Constitution of the United States,
> Amendment XIV, § 1:
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

On November 21, 1976, Respondent William Blackburn was convicted of three counts or armed robbery. This crime occurred at the house of Edward and Raymonde Redmond, an elderly couple who lived in Ferndale, Michigan.

At approximately 10:00 a.m. on February 17, 1976, a neighbor of the Redmonds, Mary Carnwath, looked out her bedroom window and saw a car pull up in front of her house. (R, 82) She identified it as a 1972 or 1973 tan Buick. (R, 83) There were three men in the car. Two got out and the third, the driver, subsequently drove the car into a nearby church parking lot and then drove away from the area completely. (R, 88) One of the two men that got out of the car was carrying a 2-foot by 3-foot box with the word "Delsey" visible on it. (R, 84) Both men had on tan or brown coats and knit ski caps — one green and one red — with the edges rolled up. (R, 84, 99) Mrs. Carnwath thought the whole thing looked pretty suspicious so she wrote down the car's license number on a piece of paper. (R, 85)

Mrs. Raymonde Redmond took the stand and testified that at approximately 10:00 a.m. on February 17, 1976, she answered her door and was confronted by two men. One was carrying a box with the word "Delsey" visible on it. (R, 115, 117) One of the men wore a camel-colored coat and both had knit ski caps on their heads — one green trimmed in yellow and one red. (R, 115-116) The men said that the box was for her and she'd have to sign for it. (R, 115) She asked where the box was from and was told it was from Ohio. (R, 117) While they were talking, Mrs. Redmond had a clear and unobstructed view of the men's faces as they stood side-by-side on her porch. She spoke with them for several minutes about the package, during which time she paid attention to them. (R, 118-119) She subsequently identified the Respondent in court. (R, 119)

When they continued to insist that she must sign for the "package," she turned to get a pen. When she turned back, the men had entered her house. The knit ski caps proved to be ski masks and these had been

pulled down over their faces. One of the men (she thought it was "Zielinski," the man in the green ski mask) pointed a gun at her while the other man raced upstairs. (R, 120-121) She was directed to her bedroom and she and her husband were subsequently bound hand and foot while they lay on their bed. (R, 122) She heard the noise of someone rummaging around upstairs. (R, 123)

While the robbery was in progress, the Redmonds' daughter, Freda Neville, arrived at their house with two children (one was Mrs. Neville's son and the other was a little girl Mrs. Neville baby-sat for). (R, 125, 209) Mrs. Neville testified she arrived at approximately 10:30 a.m. and was confronted, upon walking in, by a man in a green ski mask with a gun. (R, 210) Mrs. Redmond heard her scream. (R, 126) Mrs. Neville and the children were herded into the bedroom.

A pearl necklace and ring was taken from Mrs. Redmond (R, 128) and some rings were also taken from Freda Neville. (R, 218) One of the men then made a phone call; Mrs. Redmond identified the man as the one in the green mask (R, 133), while Mrs. Neville said it was the one in the red mask. (R, 220) The man who made the phone call cut the telephone wire after having contacted someone on the other end regarding picking them up. (R, 133, 222) Freda Neville could not see the men's faces but she could see their eyes and testified that the man in the green mask had bluish-green eyes while the man in the red mask had dark brown eyes. (R, 224-226)

While the men were waiting to be picked up, the Redmonds' cousins, Emmanuel and Helene Duchenne, stopped by the house. (R, 134, 222) Emmanuel Duchenne testified that they arrived at the Redmonds' house between 11:00 and 11:15 a.m. (R, 239) They went to the

back door and found it locked, which they thought was unusual since they knew the Redmonds were expecting them. (R, 240) Mrs. Duchenne stayed at the back door while Mr. Duchenne went around front. He looked in the front window and saw a man in a green ski mask who pointed a gun at him. He ran next door, calling to his wife as he ran. (R, 240) Mrs. Duchenne was confronted at the back door by the man in the green ski mask with a gun. She ran around to the front and heard her husband calling her. (R, 243) The man she had seen came out of the house and the last she saw of him, he jumped over the side fence and ran away. (R, 245-247) Mr. Duchenne called the police from the neighbor's house. (R, 241)

Ferndale police who responded to the call subsequently arrested an individual, later identified as Anthony Zielinski, at an optometrist's office a short distance from the scene of the crime. (R, 254) The arresting officer, Captain Russell Rey, found a number of articles on Zielinski's person and in his possession which connected him to the crime. (R, 254-260) Zielinski was read his *Miranda* rights and transported to the Ferndale Police Station. (R, 260-291)

Zielinski was interested in talking about the crime. On the evening of the robbery, he was interviewed at length by the Chief Assistant Oakland County Prosecutor, Richard Thompson. After being again advised of his *Miranda* rights and that no promises would be made — he would have to plead guilty to one count of armed robbery — Zielinski made a lengthy statement. (R, 299-300)

Mr. Zielinski testified at trial and stated that the robbery had been perpetrated by himself, Respondent, and a man named Joe May. The robbery was planned earlier in the morning of the day it took place. The

three participants all lived near one another in the Cass Corridor area of Detroit. The planning session took place at the Camelot Café. (R, 369-370) It was decided that Joe May would drive because he had a car that was equipped with special switchable license plates and a police siren. The Redmonds' house was selected as the target because the thieves had information that the house was inhabited by an elderly couple and that there was a $40,000 coin collection there. (R, 371-372) Joe May supplied a .22 magnum revolver for their use; they also had a knife. Respondent and Zielinski cut down a box and taped it back together. They planned to use it to pose as deliverymen. They also had a spool of wire to use for tying the victims up and ski masks to pull over their faces. They assumed that the brief view available while they were unmasked would not be sufficient to create a lasting impression since the victims were elderly and would be unnerved by the sight of the gun. (R, 372-374) Though the masks would cover their faces, Zielinski testified that their eyes were plainly visible through slits in the masks. He further testified that his eyes were blue and that Respondent's eyes were dark brown. (R, 405)

Prior to going to the victims' house, the trio of thieves went to a nearby Top Hat Restaurant. They copied the number from one of the phone booths located there and tested the phone to make sure it would ring. This spot was where Joe May would wait with the car while the robbery was in progress; they didn't want any suspicious vehicles waiting in front of the house. The telephone number was written on a rent receipt which Zielinski placed inside his pack of Kool cigarettes. (R, 375-376) Respondent and Zielinski had gloves which they planned to wear so as to avoid leaving fingerprints. (R, 377) Most of the paraphernalia utilized in the robbery was recovered by the police and

identified by Zielinski at trial. (*See, for example,* R, 373, 374, 376-379)

Zielinski testified that they exited May's car several houses away from the target house. He and Respondent stood side by side on the porch for two or three minutes talking with Mrs. Redmond trying to gain entrance. He stated that it was a bright day, that it was not dark on the porch, and that the glass storm door offered an unobstructed view to Mrs. Redmond. (R, 380-382) After entering the house, Zielinski testified that he ran upstairs to look for valuables while Respondent kept the Redmonds downstairs. He admitted tying them up at Respondent's direction. He likewise indicated he made two telephone calls before he was able to contact Joe May at the restaurant. He then cut the phone wire. (R, 391-392) He also admitted that he took the rings and jewelry from the women at Respondent's direction. (R, 389) He estimated they were in the house for 30-45 minutes, possibly longer. (R, 390)

While on direct examination, Zielinski gave a detailed summary of his dealings with the prosecutor's office, including all the promises that had been made to him. (R, 365-368; 399-401; 406) He also detailed his past record and history of incarceration. (R, 363; 402-404) Detective Sergeant Michael DeCamillo of the Detroit Organized Crime Intelligence Section detailed his involvement with the case. He testified that pursuant to information supplied by Zielinski,, he arrested Joe May and impounded May's car which fit Zielinski's description. (R, 443-444) DeCamillo knew Respondent and tried to locate him at the Eddystone Hotel but Respondent had vacated the rooms he occupied there. (R, 444-445)

After receiving the information of Respondent's involvement in the robbery from Zielinski, Detective Lieutenant Jack Brown of the Ferndale Police Department assembled a photo line-up and took it to the Redmonds' house. (R, 140) On the night of the offense, Mrs. Redmond viewed the seven photographs and selected Respondent's picture as one of the men who had robbed her home that day. (R, 141-144) At the time of this line-up, Respondent was not in custody. (R, 142) In fact, he was not apprehended until approximately eight months later in New York. He was held there on a federal fugitive warrant and was picked up by Detective Sullivan in January, 1977, for transportation back to Michigan. (R, 459; 483-484)

Prior to trial, Defense counsel obtained a transcript of the preliminary examination testimony. (R, 489-490) After the delay occasioned by Respondent's request for discovery, the trial was scheduled for, and began on, September 12, 1977. On September 26, 1977, after two days of jury deliberations, the trial judge made a finding that the jury was hopelessly deadlocked. Pursuant to this finding Respondent moved, through his counsel, for a mistrial. This motion was granted. The second trial began on November 14, 1977, as the first trial to take place in the next jury term. On November 21, 1977, Respondent was convicted by a jury on all three counts of robbery armed. On December 19, 1977, Respondent was sentenced to sixty (60) to ninety (90) years imprisonment on Count I and to life imprisonment on Counts II and III.

Appellate counsel was appointed and an appeal was filed. On January 9, 1980, the Michigan Court of Appeals issued a published opinion affirming Respondent's conviction. *People* v *Blackburn*, 94 Mich App 711 (1980). (F-1) On November 19, 1980, the Michigan

Supreme Court denied Respondent's request for relief. (E-1)

In October of 1981, Respondent filed a petition for writ of habeas corpus in the District Court for the Eastern District of Michigan. An evidentiary hearing was ordered on Respondent's claim of ineffective assistance of counsel. On March 21, 1985, following the hearing, the magistrate issued a report and recommendation for denial of the petition. (D-1) Respondent filed objections to the report. The petition was denied on August 8, 1986, by the District Court. (C-1)

Respondent appealed this decision to the Sixth Circuit. On September 17, 1987, that Court reversed the decision of the District Court and directed that the writ should issue unless Respondent was granted a new trial within a reasonable time. (B-1)

A motion for stay of the mandate filed by the Petitioner was granted by the Sixth Circuit on November 3, 1987. (A-1)

JURISDICTION IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Federal jurisdiction was invoked in the Court of Appeals under 28 USC 2253.

REASONS FOR GRANTING THE WRIT

Ten years after Respondent's conviction in state court for three counts of armed robbery, a three-judge panel of the Sixth Circuit became the first judicial body to decide that Respondent's right to a fair trial had been violated by the errors of his trial counsel. The decision of the Sixth Circuit constitutes a patent mis-

application of this Court's decision in *Strickland* v *Washington*, 466 US 668 (1984). It contrasts strongly with the proper application of the *Strickland* principles evidenced by the decision of the District of Columbia Circuit Court in *United States* v *Debango*, 780 F2d 81 (CA DC, 1986).

The decision of the Sixth Circuit is based upon their interpretation of a ten-year-old state court trial record and the record made at a hearing conducted five years ago. The Sixth Circuit has proceeded to substitute its interpretation of the testimony for those made by the judges who were actually present. Although acknowledging that "the district court's findings of fact are subject to the clearly erroneous standard of review," the Sixth Circuit evidenced no reluctance to substitute its judgment for that of the district court. Rather than performing judicial scrutiny that is "highly deferential" to trial counsel's performance, the Sixth Circuit has performed a search for error and has speculated on the possible effects trial counsel's alleged errors may have had on the trial.

In *Strickland, supra*, this Court admonished courts reviewing claims of ineffective assistance that:

> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, * * * and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding * * * .
>
> 466 US at 693.

The standard which must be satisfied by the defendant in order to prevail is:

> * * * The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
>
> 466 US at 694.

The importance of meeting this standard was emphasized by this Court when it reiterated that the defendant must demonstrate that "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." 466 US at 695. Respondent failed to satisfy this exacting standard. Nevertheless, the Sixth Circuit ignored these admonitions and chose instead to speculate on the *possibility* that the alleged errors could have deprived Respondent of a chance for acquittal. In fact, the Sixth Circuit was so intent on finding error that portions of the trial record were taken out of context and misinterpreted to support the result the Court wished to achieve. It was at the step farthest removed from the trial that this revision of the record occurred. Furthermore, instead of viewing skeptically Respondent's claim that these alleged errors deprived him of effective representation, the Sixth Circuit chose to belittle the testimony of the prosecution's witnesses while accepting Respondent's testimony at face value.

Respondent alleged that his trial counsel committed three errors which were so serious that, in conjunction, they deprived him of a fair trial. These alleged errors were the failure of counsel to move the trial court to preclude the prosecution from impeaching Respondent with his prior convictions, failure to file a notice of alibi and investigate or endorse a particular alibi witness, and failure to obtain a transcript of the first trial

for use in impeaching the testimony of one of the prosecution's witnesses. It is absolutely impossible for this Court to review the evidence presented at trial in total and conclude that even absent the alleged errors, Respondent would have had a reasonable chance of being acquitted.

Accepting, for the purposes of argument alone, that these alleged failures constituted serious errors, Respondent still failed to satisfy the actual prejudice component of *Strickland, supra.* The fact that the Sixth Circuit did not require this showing of Respondent strongly indicates that despite what would appear to be a clear directive from this Court, lower appellate courts are still applying an incorrect standard of review in ineffective assistance of counsel cases. This creates a body of law and precedent which adversely affects the finality of state court judgments. It is important that this Court exercise its supervisory power over lower courts to correct this misperception before a substantial body of law develops misapplying *Strickland.*

With respect to the first alleged error, the Sixth Circuit appears to proceed from the assumption that if a motion to exclude reference to prior convictions had been made, it would have been granted *and* Respondent would have testified. Trial counsel indicated (both at trial and at the hearing) that it was his understanding that Respondent did not wish to testify. (R, 480; Hr I, 96) In fact, Respondent "made it very clear" to trial counsel that he had no intention of taking the stand. (Hr I, 103, 105)

Moreover, although if a motion had been made it is likely at least the two oldest convictions would have been suppressed, it is by no means certain (or even probable) that the (concededly valid) most recent conviction would have been suppressed. [At the hearing,

Respondent testified that he asked his counsel to suppress only the 1945 and 1948 convictions — Hr I, 16] There is little logic to the suggestion that the accomplice's credibility could be attacked with his prior convictions but that Respondent could present himself to the jury as a man without blemish.

Furthermore, if Respondent had testified, it is very likely his testimony would have hurt, rather than helped, him. Aside from the question of his prior convictions, Respondent did not want to have to explain why he had fled the jurisdiction immediately after the robbery. (R, 445) Respondent's home was in a hotel across from where the robbery was planned. (R, 369-370) He was a known associate of the two co-defendants, Zielinski and May. Respondent knew the prosecution had a statement from convicted accomplice Joe May and was prepared to use him as rebuttal to anything Respondent might say. (Hr I, 110-111) [In this connection, it should be noted that the Sixth Circuit took pains to point out that Joe May's conviction was reversed by the Michigan Court of Appeals and he was not retried. (App B, B-3 n 1) What the Sixth Circuit doesn't note is that following the reversal on July 7, 1978, May wasn't retried because he instead pled guilty on May 29, 1979, and was sentenced to 7 to 11 years imprisonment on June 25, 1979. Thus the Sixth Circuit suggests that the case against May fell apart when in reality, the prosecution never even had to conduct another trial.]

Since Respondent's testimony apparently would have consisted essentially of the unsupported claim that he was around the neighborhood of the Camelot Bar at the time of the robbery, it certainly wasn't probable that he would have been acquitted. His decision to testify would probably have hurt him by allowing the prosecution to attack his story for inconsistencies and attack him for fleeing town.

In short, there is little support for the Sixth Circuit's suggestion that Respondent would have testified but for the failure of his counsel to move for suppression of his prior convictions. In truth, as counsel testified, Respondent never intended to testify — after all, why should he, the first trial had ended with a hung jury. Respondent didn't need to expose himself to cross-examination; he merely had to repeat the performance of the first trial.

Likewise, failure to file a notice of alibi or to investigate and endorse Bill Campbell as an alibi witness did not cause Respondent to suffer actual prejudice. Campbell's testimony was highly suspect. Respondent was living in Campbell's apartment at the time of this incident. (Hr II, 5) Campbell's testimony at the hearing demonstrated his inability to remember anything about the day in question except that he saw Respondent while walking his dog. The first time he was asked to remember whether he'd seen Respondent on the day in question was a request by Respondent's mother "a long time" after the indicent. (Hr II, 19-20) It was after Respondent had been arrested (Hr II, 19), which occurred about a year after the incident. (R, 459) He was a good friend of Respondent's (Hr II, 14) and had visited him in Jackson Prison prior to the hearing. (Hr II, 11-12; 18) It is not reasonable to conclude that the jury would have believed Campbell or been at all impressed with his credibility. These weaknesses were recognized by the district court, but were completely ignored by the Sixth Circuit. As the Court in *United States* v *Debango*, *supra*, stated: "To put the prejudice issue in context, we note that the evidence against appellant was compelling." 780 F2d at 85.

The Sixth Circuit instead concentrated on the "weakness" of Anthony Zielinski's testimony. This

weakness consisted solely of the fact that Zielinski was an accomplice who had made a deal with the prosecution in return for his testimony. That fact does not weaken his testimony, however, since there was much independent corroboration of his story.

For example, Zielinski had described Joe May's specially-equipped car in detail. The police recovered the car and determined that it matched Zielinski's description exactly. (R, 460-465) Zielinski had told the police that three men were involved in the robbery: he and Respondent had gone to the house and Joe May had driven the getaway car. May had driven away to wait at a pre-arranged location for a phone call to come and pick up Zielinski and Respondent. Zielinski and Respondent wore ski caps on their heads which they pulled over their faces when they forced their way into the house. Zielinski also described how they used a box with the word "Delsey" on it to impersonate floral delivery men and talk their way into the house. He described in detail how they accomplished the robbery, how relatives showed up and had to be tied up, and how other relatives showed up causing he and Respondent to flee from the house.

The victims of the robbery only saw two men, but a neighbor, Mary Carnwath, testified that she saw three men in a tan Buick pull up in front of her house. Two men got out and one stayed in the car. These men were carrying a box with the word "Delsey" on it (a local florist shop). They wore knit ski caps — one green and one red. She felt they were suspicious so she wrote down the license number of the car. The car pulled into a church parking lot and, several minutes later, left the area altogether. (R, 82-88) The victims of the robbery, particularly Mrs. Redmond, verified the description of what the robbers wore and their use of the

"Delsey" box. They also described how one of the robbers used the telephone to call someone to come and pick them up.

Zielinski testified that Respondent was the man who went into the house with him. The Sixth Circuit was not impressed with his testimony — but not because it was inconsistent, merely because he was an accomplice who had made a deal with the police. Yet, as demonstrated above, Zielinski's testimony was corroborated by other independent witnesses and evidence.

The Sixth Circuit also decried the "inconsistencies" in the testimony of victim Raymonde Redmond. Yet these "inconsistencies" were exceedingly trivial. Mrs. Redmond, on the night of the robbery, was shown a photographic lineup by the police. She selected Respondent's picture from the lineup. (R, 140-144) Thus, on the date of the crime, Mrs. Redmond demonstrated her ability to identify Respondent. She subsequently consistently identified him at examination and both trials.

The most disturbing aspect of the Sixth Circuit's review, however, was the way in which they excerpted some of Redmond's testimony from the first trial out of context and then pointed to this testimony as being inconsistent with her testimony at the second trial.

At page 14 of the Sixth Circuit's opinion (App B, B-16), the court cited testimony from the first trial that indicated Redmond had only seen the men on her porch for a minute. However, when it is read in context, it is clear Redmond was saying that it took within a minute for her to turn to get a pen and have the robbers force their way into her home, pull down their masks, and point a gun at her. The full testimony was:

Q. Did you let the men into the house or did they at that point of time —

A. (Interposing) They pushed themselves in, went right in.

Q. Now, did they push themselves into the house after you reached for the pen?

A. Well, they — things went so quickly at the time that as I opened the door they opened the door. The one flew upstairs, the one was behind me. I reached for the pen and then looked for the papers to sign and, like I say, he had the mask over his face and the gun pointed at me.

Q. Then that whole —

A. (Interposing) Now, that was all that was within one minute's time, I'm sure it couldn't have been much longer.

Q. The whole thing happened fast, didn't it?

A. It sure did.

Q. The doorbell rings, you go to the door; bingo, a man is running upstairs. The other is standing in —

A. (Interposing) *I didn't say that.*

Q. All right.

A. *I said I spoke to those men — to the one man — for awhile.* We were standing there and I talked and he asked me — wait a minute. I'm getting confused again. He had a package in his hand and he told me it was a package from Cincinatti [*sic*], Ohio, • • • .

(Tr of first trial, [hereinafter "TFT"] 36-37; emphasis supplied)

Thus Mrs. Redmond consistently maintained that she talked to the men on her porch for a few minutes before they forced their way inside. It was that act — the men forcing their way in — that happened "within a minute." Mrs. Redmond made this clear when trial counsel tried to suggest the whole action had occurred in that space of time. Mrs. Redmond immediately corrected him. Interestingly, Zielinski testified that they were on the porch talking to Mrs. Redmond for two or three minutes trying to gain access to the house. (R, 381) The Sixth Circuit's conclusion that Mrs. Redmond testified inconsistently and that counsel "was unable to put before the jury her prior inconsistent testimony that she saw the robbers unmasked for a minute's time at most" (App B, B-17) is a clear misreading of the testimony.

Similarly, the Court made much out of her testimony at the first trial that she saw the men from five feet away and saw Respondent only in profile. At the second trial she testified they were "not much further than three feet at the very most" and that she could see the full faces of both men. Aside from the fact that these "inconsistencies" are trivial when compared with her consistent identification of Respondent as the second man, the total trial record indicates that Redmond testified at the first trial that the second man "never turned his face" — "*most of the time* I was only seeing a profile of his face. I could *see a lot of it*, but he never turned his face in one direction or another." (TFT, 47; emphasis supplied) However, the Sixth Circuit again ignored the fact that on redirect Redmond was asked if she could see his whole face and she responded: "Yes, most — well, he was turned on an angle." (TFT, 49)

At the second trial she testified on direct that she saw the full faces of both men. (R, 118) On cross-examination she was asked if she "ever saw any portion of [Respondent's] face other than his profile, his side?" She responded: "I saw most of his face." (R, 183) She further acknowledged that "the other time" [*i.e.*, the first trial]:

> * * * I told you I did not see maybe part. I saw his profile because I could see that, but I could see his face directly, but maybe there was one side I probably didn't see as clearly as the other.
>
> (R, 184)

In light of her explanation, it is clear that any impeachment would have served little purpose. It certainly wouldn't have caused a juror to form a reasonable doubt as to Respondent's guilt.

In summary, the Sixth Circuit has ignored the principles set down by this Court in *Strickland* v *Washington, supra*. It has misinterpreted the record and has accordingly misjudged the strength of the prosecution's case. If this decision is allowed to stand, it will place a nearly impossible burden on the prosecution. Mrs. Redmond was sixty-six at the time of the robbery. If she is still alive, she would now be over seventy-seven years old. She was very emotionally affected by this event: "Every day of my life I live this over and over again. I sleep and wake up with it." (R, 182) Because the Sixth Circuit misapplied *Strickland*, the Sixth Circuit would now have Mrs. Redmond relive this terrifying event she thought was finished ten years ago.

As this Court stated in *Strickland*, and has reiterated in *Hill* v *Lockhart*, ___ US ___; 106 S Ct 366; 88 L Ed 2d 203 (1985):

> * * * The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. * * *
>
> 466 US at 693.

If the district court had decided to reverse Respondent's conviction, then the prosecution could have sought relief in the Court of Appeals. It is only because the Court of Appeals was the first court to find that Respondent was prejudiced by the alleged errors of his trial counsel that the prosecution has been forced to appeal to this Court for relief. This Court truly is the Court of last resort for the victim, Mrs. Redmond.

This Court has wisely required that reviewing courts "make every effort . . . to eliminate the distorting effects of hindsight." 466 US at 689. The Sixth Circuit has not only failed to eliminate the distortion, but has added to it. The overwhelming evidence adduced at Respondent's trial demonstrates that he received a fair trial — one whose result was reliable. If he is retried now — ten years later — the people of the state of Michigan will not receive a fair trial. Instead, it is quite possible that a guilty man will walk free because an appellate court erred. This should not be allowed to happen.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Honorable Court grant this Petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, or, in the alternative, grant summary reversal of the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

L. BROOKS PATTERSON (P18708)
PROSECUTING ATTORNEY
OAKLAND COUNTY

ROBERT C. WILLIAMS (P22365)
CHIEF, APPELLATE DIVISION

By: /s/ RICHARD H. BROWNE (P27825)
Assistant Prosecuting Attorney
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DATED: December 15, 1987

APPENDICES TO PETITION FOR CERTIORARI

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APPENDIX A

ORDER STAYING MANDATE

(United States Court of Appeals — Sixth Circuit)

(Filed November 3, 1987)

(WILLIAM BLACKBURN, Petitioner-Appellant, vs. DALE FOLTZ, Respondent-Appellee — No. 86-1815)

Upon consideration, it is ORDERED that the motion to stay issuance of the mandate pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed until the date on which the movant's application for a writ of certiorari must be filed pursuant to 28 U.S.C. Section 2101 or Rule 20 of the Supreme Court Rules, as applicable. However, if within such time, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Upon the filing of a copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN,
CLERK

6CA-79
1/86

APPENDIX B

OPINION

RECOMMENDED FOR FULL TEXT PUBLICATION

See, Sixth Circuit Rule 24

(United States Court of Appeals — Sixth Circuit)

(Decided and Filed September 17, 1987)

(WILLIAM BLACKBURN, Petitioner-Appellant, v. DALE FOLTZ, Respondent-Appellee — ON APPEAL from the United States District Court for the Eastern District of Michigan; No. 86-1815)

Before: KEITH and NORRIS, Circuit Judges; and PECK, Senior Circuit Judge.

PECK, Senior Circuit Judge.

Petitioner William Blackburn appeals from a district court judgment which denied his petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Blackburn was tried initially in September 1977 on three counts of armed robbery in Michigan. The proceeding ended in a mistrial due to a deadlocked jury. Blackburn was retried before a jury in November 1977 and convicted on all three counts. Blackburn contends on appeal that he was denied effective assistance of counsel at the second trial in three ways: Blackburn's counsel failed to move for suppression of Blackburn's prior convictions and gave him erroneous legal advice concerning the possible use of those convictions if he testified; he failed to obtain the transcript from the first trial in order to impeach the sole identifying witness at the second trial; and he did not investigate or file a notice of Blackburn's alibi. For the reasons

stated herein, we reverse the district court's denial of the writ.

I.

Blackburn was charged with the armed robbery of the Redmond family residence. At the first trial Mrs. Redmond testified that around 10 a.m. on February 17, 1976, two men came to her door to deliver a package. She testified that the men were standing approximately five feet away from her. Mrs. Redmond recalled that the man closer to her asked her to sign for the box. This man was Anthony Zielinski who was apprehended shortly after the robbery with the stolen property on his person. Mrs. Redmond turned to a nearby desk to get a pen and when she turned back around, the men were wearing ski masks. Mrs. Redmond estimated that this all occurred in less than one minute's time. She testified that the man in a green ski mask, Zielinski, held a gun on her, while the other robber in a red ski mask went upstairs. Mrs. Redmond testified that Zielinski then tied her up face down on a bed. He did the same to her husband, who had been dressing in another room and did not see the men unmasked. Jewelry and part of a coin collection were taken.

At the trial Mrs. Redmond identified Blackburn as the robber who donned the red ski mask, but could not remember particulars about his appearance. She also stated that at the front door, the only time she saw the men unmasked, the man she identified as Blackburn "always looked toward the west . . . . [M]ost of the time I was only seeing a profile of his face, not a full view of his face . . . . [H]e was turned on an angle." Mrs. Redmond further testified that she identified one of the robbers from a photographic array shown to her by the police, but could not remember whether it was Zielinski or the defendant.

Zielinski, who pled guilty to armed robbery, also testified for the prosecution at the first trial. He admitted that he pled guilty to the armed robbery in exchange for certain benefits from the state. He also admitted that his testimony against Blackburn was partly motivated by revenge. He testified that he, Blackburn and Joe May, who was tried separately,[1] planned the robbery. Zielinski testified that he and Blackburn committed the robbery after May drove them to the Redmonds' residence. Zielinski stated that Blackburn held a gun on Mrs. Redmond while he ran upstairs to ransack the house. Zielinski also testified that when he came downstairs Blackburn told him to tie up the Redmonds. Zielinski recalled that he telephoned May to come pick them up. When May was late, Zielinski testified that he went outside to look for him and that, when he shortly thereafter saw a man run from the house, he knew that the plan had fallen apart. Zielinski testified that he saw a police car pull up at the house and he quickly left the immediate area. Zielinski stated that he saw Blackburn and May drive past him, but they did not stop to pick him up. Zielinski testified that he went into a doctor's office to telephone a cab. He was apprehended there with the stolen property, a knife, and green ski mask on his person.

Two other witnesses testified that they saw a man wearing a green mask at the Redmonds. Neither saw the other robber. As indicated above, the jury was unable to reach a verdict and a mistrial was declared.

At the second trial conducted in November 1977 Mrs. Redmond again testified. Although she still maintained

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[1] May was convicted, but his conviction was reversed by the Michigan Court of Appeals. He was not retried.

that Blackburn was the robber, her testimony differed from the first trial in some respects. She testified that she was no more than three feet away from the robbers at the front door. She also testified that she talked to them about ten minutes and that she could see the full faces of both men. Mrs. Redmond also stated that she selected Blackburn's photo from the photographic array. Mrs. Redmond initially stated that one ski mask was blue, but on seeing the exhibit in the courtroom, corrected herself to state that it was red. Zielinski's testimony remained essentially unchanged. Unlike the first trial, Blackburn was convicted on all counts, and was sentenced to two concurrent life terms and a third term of 60 to 90 years.

The Michigan Court of Appeals affirmed the conviction. *People* v. *Blackburn*, 94 Mich. App. 711, 290 N.W. 2d 61 (1980). The Michigan Supreme Court denied Blackburn's request for review. *People* v. *Blackburn*, No. 64671 (Mich. S. Ct. Nov. 19, 1981). In October 1981 Blackburn filed for a writ of habeas corpus. Then District Court Judge Guy ordered an evidentiary hearing on Blackburn's claim of ineffective assistance of counsel with regard to counsel's failure at the second trial to move for exclusion of prior convictions, failure to investigate Blackburn's alibi defense, and failure to procure the transcript from the first trial for impeachment purposes. The evidentiary hearing was held before a magistrate on September 21, 1982.[2] On March 21, 1985, the

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[2] At this point in the proceedings, the state claimed that Blackburn's failure to request an evidentiary hearing or move for a new trial before the trial court with regard to the issue of ineffectiveness of counsel constituted a state procedural default that precluded habeas corpus review of his claim under *Engle* v. *Isaac*, 456 U.S. 107 (1982). After examining the record the magistrate determined that the state appellate court did not rely on the alleged procedural de-

(*concluded on page B-5*)

magistrate issued a report and recommendation for denial of the petition. Blackburn timely filed objections to the report. Judge Hackett, to whom the case was reassigned, denied the petition on August 8, 1986. Blackburn then timely filed his notice of appeal on September 5, 1986.

II.

In *Strickland* v. *Washington*, 466 U.S. 668 (1984), the Supreme Court set forth a two-pronged test for determining whether counsel's representation of a criminal defendant at trial or a capital sentencing proceeding is so deficient as to require reversal of the defendant's conviction:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be

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(*continued from page B-4*)

fault in denying Blackburn's request for review, so there was no bar to federal habeas corpus review. *See Meeks* v. *Bergen*, 749 F.2d 322, 325 (6th Cir. 1984). Although the state waived any right of appeal on this issue by not objecting to the magistrate's report and recommendation, *United States* v. *Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981), we note our agreement with the magistrate's analysis and with the district court's adoption of the magistrate's recommendation on this point.

> said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. Under the *Strickland* test, a reviewing court's "scrutiny of counsel's performance must be highly deferential," and must strongly presume that counsel's advocacy fell "within the wide range of reasonable professional assistance." *Id.* at 689. In evaluating counsel's performance the court should also "keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id.* at 690. A reviewing court must not indulge in hindsight, but must evaluate the reasonableness of counsel's performance within the context of the circumstances at the time of the alleged errors. *Id.* at 689.90; *Kimmelman* v. *Morrison*, 106 S. Ct. 2574, 2586 (1986). Although the district court's findings of fact are subject to the clearly erroneous standard of review, Fed. R. Civ. P. 52(a), the performance and prejudice components of the *Strickland* test are mixed questions of law and fact freely reviewable by the appellate court. *Strickland*, 466 U.S. at 698; *Meeks* v. *Bergen*, 749 F.2d 322, 327 (6th Cir. 1984). With these principles in mind, we turn to the merits of Blackburn's argument that he was denied effective assistance of counsel as guaranteed him by the Sixth Amendment.

III.

Blackburn first asserts that the failure of his counsel, Mr. Girard, to move for suppression of his three prior convictions deprived him of effective assistance of counsel. These three prior convictions were: a 1945 larceny conviction; a 1948 armed robbery conviction; and a 1977 conviction for aiding and abetting the carrying of a

concealed weapon in an automobile. At the magistrate's evidentiary hearing, Girard testified that he believed that such a motion was unnecessary because Blackburn had signaled his intent from the beginning not to testify. Girard also recalled that he advised Blackburn that if he were to testify on his own behalf, the prosecution would probably produce Joe May as a damaging rebuttal witness. Girard did not recall advising Blackburn during the second trial that all prior convictions could be used against him. However, Blackburn testified at the evidentiary hearing that he told Girard that he wanted to testify after the prosecution had rested at the second trial, but Girard advised him that the prosecution could impeach him "back to day one."

The district court accepted Girard's testimony that Blackburn did not want to testify and determined that under the circumstances Girard did not seek supression as "part of a deliberate and reasonable trial strategy." However, in so finding and concluding the district court seems not to have taken into account a critical exchange between Girard and Blackburn set forth in the second trial transcript:

> MR. GIRARD: At this juncture I would like to briefly on the record ask Mr. Blackburn if he desires to take the witness stand and testify on his own behalf at this trial. It is my understanding he does not, and I would like to just indicate on the record that he has been appropriately advised of his constitutional rights and principles.
>
> Mr. Blackburn has handed to me for presentation to this Court a citation of the People versus Trombley located in Michigan Court of Appeals 67. Mr. Blackburn has reason to be-

lieve this citation precludes the Prosecuting Attorney's cross examination of him pertaining to his criminal record dating more than ten years from the date in question.

I have advised Mr. Blackburn that my understanding of the law does not so indicate, and that *it is my opinion that if he does take the witness stand, the Prosecution can, in touching upon his credibility as a witness, probe any possible criminal record he has from the day he began life to today's date.*

* * *

I'd like to ask Mr. Blackburn on the record if he desires to take the witness stand, and if he well appreciates his constitutional rights and principles and what rights he does not waive by not taking the stand. I want him to acknowledge the fact that if he does not take the witness stand, neither the Prosecution nor the Court in its charge can make any comment about him not taking the stand. In fact, the Court will make a specific charge of law to the jury suggesting that the mere fact that he did not take the witness stand cannot be utilized as evidence against him.

Mr. Blackburn, do you desire to take the witness stand —

DEFENDANT BLACKBURN: No.

MR. GIRARD: — and testify in your own behalf?

I am satisfied he is taking the right step and making the right decision.

THE COURT: Very well, Mr. Girard. (emphasis added)

The record corroborates Blackburn's testimony and casts significant doubt on Girard's recollection. More importantly, the district court's error in this regard led it to the unsupportable conclusion that Girard's failure to seek suppression was "part of a deliberate and reasonable trial strategy."

Mr. Girard's recitation of the law regarding admissibility of prior convictions was clearly wrong (and which, curiously, elicited no correction from the bench) and cannot be said to constitute reasonable strategy. Although the Michigan Rules of Evidence had not yet been adopted at the time of Blackburn's trial, the two older convictions would have been suppressed upon motion, because they were uncounseled, *Loper* v. *Beto*, 405 U.S. 473, 483 (1972), and they were very old, *People* v. *Robinson*, 79 Mich. App. 145, 164-65, 261 N.W. 2d 544, 554 (1977). It is also by no means certain that even the more recent 1977 concealed weapons conviction would have been used to impeach Blackburn. Under Michigan law at that time, as well as under the current Michigan Rules of Evidence, factors to be considered in determining the admissibility of a prior conviction include: "the nature of the prior offense, whether the conviction was for substantially the same conduct as that for which the accused is on trial, and the effect on the decisional process if the accused does not testify for fear of impeachment by prior convictions." *People* v. *Hughes*, 411 Mich. 517, 520, 309 N.W. 2d 525, 526 (1981). As stated by the Michigan Supreme Court the purpose to be served in conducting this analysis is:

> 1) To put before the jury only those prior convictions indicative of the defendant's disposition toward truthfulness and veracity; and

2) To keep from the jury those convictions which, although they may be indicative of defendant's disposition toward truthfulness, may interfere with the jury's ability to determine the defendant's guilt or innocence on the basis of the evidence.

Id. at 520-21, 309 N.W. 2d at 526-27. Under this analysis even the 1977 conviction for aiding and abetting the carrying of a concealed weapon might have been suppressed inasmuch as evidence of that conviction is not probative of Blackburn's veracity and it deterred Blackburn from testifying. Moreover, since possession of a weapon is an element of the charged crime, *People* v. *Lloyd*, 5 Mich. App. 717, 722, 147 N.W. 2d 740, 743 (1967); *see* M.C.L.A. 750.529, the judge could have determined that evidence of the prior conviction would be unduly prejudicial.

Regardless of the outcome of the admissibility determination regarding the 1977 conviction, had Girard correctly stated the well established law, Blackburn would have had a meaningful opportunity to decide whether to testify knowing that he could possibly be impeached by only one concealed weapons conviction and not by his two other convictions, one, importantly, for armed robbery, the very charge for which he was on trial. Counsel's error takes on added significance in view of the fact that as a practical matter no viable defense was presented on Blackburn's behalf. Thus, we cannot agree with the trial court's determination that counsel's failure to move for suppression "was part of a deliberate and reasonable trial strategy." Counsel's failure to move for suppression and his legal advice to Blackburn was based, not on strategy, but on mistaken beliefs and "a startling ignorance of the law." *Kimmelman*, 106 S. Ct.

at 2588-89. As such, we cannot escape the conclusion that Girard's performance in this regard was deficient and "outside the wide range of professionally competent assistance," *Strickland*, 466 U.S. at 690.

Blackburn also alleges that Girard's falure to file a notice of alibi and to investigate potential alibi witnesses deprived him of effective assistance of counsel. Blackburn testified at the evidentiary hearing that he gave Girard names of three potential alibi witnesses: "Bill" the bartender at the Camelot Bar, Guy Reed, and William Campbell. He also told Girard that his mother would help with an alibi defense. Girard testified that he contacted Blackburn's mother, but that she was not able to provide names of potential witnesses. Girard stated that he made one short, unsuccessful trip to the Camelot Bar, but, feeling unsafe there, left shortly after he arrived with no new information. Girard testified that he did not recall the name of Reed or Campbell in connection with his investigation. However, Girard's file contained a letter from Blackburn dated May 31, 1977, setting forth Campbell's name and address. The file also contained a handwritten note on a letter dated November 2, 1977, stating: "Have Bill Campbell called . . . . " We also note the fact that Campbell testified at Joe May's trial one year earlier. At the evidentiary hearing Campbell testified that he was walking his dog about 10:30 a.m. on the date of the robbery and saw Blackburn at that time. Campbell alleged that he left messages for Blackburn's lawyer a couple of times, but that his calls were not returned. Campbell stated that he did not make any effort to call Blackburn's lawyer until a couple of months after Blackburn's arrest, nor did he volunteer any alibi when the police came to his apartment to look for Blackburn.

Although Girard did make one trip to the Camelot Bar to investigate possible defenses, he for no apparent reason failed to investigate a known and potentially important alibi witness. Under *Strickland* "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. *Accord Beasley* v. *United States* 491 F.2d 687 (6th Cir. 1974) (defense counsel has a duty to investigate "all apparently substantial defenses"). Further, American Bar Association standards, which provide guidance as to what constitutes "reasonable" professional conduct, *see Nix* v. *Whiteside*, 106 S. Ct. 988, 994 (1986); *Strickland*, 466 U.S. at 688, also mandate counsel's duty to investigate all leads relevant to the merits of the case. ABA Standard for Criminal Justice 4-4.1, 4.544-4.55 (1980). Viewing Girard's omission under the circumstances present at that time, and with deference to his professional judgment, we believe the failure to locate and question Campbell constituted ineffective representation outside the wide range of professionally competent assistance. Counsel did not make any attempt to investigate this known lead, nor did he even make a reasoned professional judgment that for some reason investigation was not necessary. *See Strickland*, 466 U.S. at 690-91.

The third alleged instance of ineffective assistance of counsel involves Girard's failure to obtain the transcript of the first trial in order to impeach Mrs. Redmond, the victim and key identifying witness at both trials. At the evidentiary hearing Girard acknowledged that the critical portion of Mrs. Redmond's identification testimony concerned "the short duration of her observation of the individual who she said was Billy Blackburn and the vantage point she had in seeing his profile." Moreover,

Girard at that hearing all but admitted that weakening Mrs. Redmond's testimony was the only plausible hope Blackburn had for acquittal:

> A. For all intents and purposes we had no defense, because Mr. Blackburn indicated that he was not going to take the witness stand. We could not sufficiently locate witnesses that would serve as a purpose of alibi, and we went to trial in a desperate attempt to preclude the prosecution from establishing the burden of proof. Our game plan was that we felt that Mr. Zalinski's [sic] testimony could be impeached because of the type of individual he was. We further felt that the testimony of Mrs. Rudmun [sic] was not as concrete as the prosecution wanted it to be . . . .
>
> Q. Was there any evidence at trial, that you attempted to produce at trial that Mrs. Redmun [sic] had misidentified the petitioner?
>
> A. There was no evidence other than her previous testimony.

Despite this knowledge, Girard expressed his belief that impeaching Mrs. Redmond would not be necessary or even desirable:

> [T]he only necessity or requirement that I would utilize in procuring the transcript of the testimony of her first trial would be to impeach her. I had the benefit of cross-examining Mrs. Redmond on two different occasions, and I knew that procedure of attempting to impeach her would be emotionally damaging on the stand be-

> cause of her emotionality and how she elicited sympathy from everyone in the courtroom. I was not going to utilize that procedure of attempting to impeach her, and I was under the impression that I wouldn't have to.

Even viewing Mr. Girard's decision with considerable deference to his professional judgment, under the circumstances of this case in which no other defense was apparent to counsel, the failure to procure the transcript for purposes of impeaching Mrs. Redmond was untenable.[3] Throughout the evidentiary hearing Girard acknowledged the centrality of Mrs. Redmond's testimony to the prosecution's case and the vital importance of weakening her testimony; yet he failed to pursue the one obvious and only logical means of diminishing her identification testimony — procuring the transcript of Mrs. Redmond's previous testimony in order to impeach her with prior inconsistent statements. When no other defense was available in counsel's view, the failure to prepare for effective impeachment of the sole eyewitness based on a hunch that her testimony would not differ from the first trial was "unreasonable under prevailing professional norms and . . . was not sound strategy." *Kimmelman*, 106 S. Ct. at 2588; *Strickland*, 466 U.S. at 688-89. Contrary to what the district court concluded, Girard's representation in this regard was deficient.

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[3] The district court accepted Girard's testimony at the evidentiary hearing that he unsuccessfully moved the trial court for a transcript of the first trial. However, the district court overlooked Girard's statement on the record at the second trial that, contrary to his client's demand, he was not requesting the transcript due to the delay it would cause. Thus, the district court's finding on this point was clearly erroneous, and may have contributed to the improper conclusion it reached regarding the reasonableness of Girard's advocacy.

Although we have addressed the above errors individually for discussion purposes, it is important to note that we have considered them within the context of counsel's *overall* performance and in view of all the facts in the record. *See Kimmelman*, 106 S. Ct. at 2589; *Strickland*, 466 U.S. at 689. Having thus concluded that Girard's performance was deficient under the *Strickland* guidelines, we turn to the prejudice component of the *Strickland* test. Under *Strickland* "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694.

Mr. Girard himself unknowingly summarized the prejudicial impact of his combined errors in acknowledging at the evidentiary hearing that Blackburn "had no defense, because [he] indicated he was not going to take the witness stand, [and] [w]e could not sufficiently locate witnesses that would serve as a purpose of alibi, and we went to trial in a desperate attempt to preclude the prosecution from establishing the burden of proof." Blackburn did not testify in his own behalf only because Girard had given him erroneous legal advice on the admissibility of his prior convictions. William Campbell, a possible alibi witness, was not available to testify as a result of Girard's negligently insufficient investigation. Having precluded Blackburn from testifying in his own defense or from introducing alibi witness testimony, Girard then failed to take any meaningful step to impeach and diminish the identification testimony of Mrs. Redmond, the sole eyewitness to the crime.

Contrary to the district court's finding that Mrs. Redmond's testimony at both trials was "substantially

the same" and that impeachment would have been unlikely, a full review of both trial transcripts reveals critical differences in Mrs. Redmond's identification testimony regarding the duration of her opportunity to observe the robber unmasked and the vantage point from which she could see his face. At the first trial on cross-examination Mrs. Redmond stated with regard to the length of time she saw the robbers unmasked:

A. Now, that was all within one minute's time, I'm sure it couldn't have been much longer.

Q. The whole thing happened fast, didn't it?

A. It sure did.

* * *

A. I didn't look at the man that much.

Q. Your observation of the men on the porch was a short period was it?

A. That's right.

However, at the second trial Mrs. Redmond testified as follows:

(Direct Examination)

Q. About how long did you talk to them before they came in?

A. I would really say about ten minutes.

Q. Ten minutes?

A. . . . Maybe not quite that long. I don't know.

(cross-examination)

Q. You indicated today . . . that you felt you'd observed them without their masks for ten minutes?

A. Approximately, yes.

Q. Haven't you previously testified that it was a matter of seconds as opposed to ten minutes?

A. No, never, not seconds.

Q. No? Never?

A. No.

Without recourse to the first trial transcript, Girard was forced to let Mrs. Redmond's testimony stand and was unable to put before the jury her prior inconsistent testimony that she saw the robbers unmasked for a minute's time at most.

Mrs. Redmond also testified at the first trial:

Q. How far away were you from these two men when you met them at the door?

A. About five feet away.

* * *

A. One thing I did notice about the man, he never turned his face.

Q. Never turned his face in what direction?

A. Toward me, he always looked towards the west. In other words, most of the time I was only seeing a profile of his face. I could see a lot of it, but he never turned his face in one direction or another.

At the second trial, she testified differently on direct examination:

Q. Would you tell us how far away you were from these two men when this conversation was going on?

A. Not much further than three feet at the very most.

Q. Was anything obstructing your vision whatsoever?

A. No.

Q. All right. Now, could you see their full faces?

A. Yes.

Q. That's both men; is that correct?

A. Both men.

On cross-examination she testified as follows:

Q. Didn't you only see a profile? Didn't you previously tell us . . . .

A. No, I told you before . . . , the other time when we had this same situation, I told you I did not see maybe part. I saw his profile because I could see that, but I could see his face directly, but there was one side I probably didn't see as clearly as the other.

At the second trial Mrs. Redmond also testified without hesitation that she definitely picked out Blackburn's photo from an array shown to her by police. At the first trial she stated, "I can't remember whether it was [Blackburn] or Mr. Zielinski that was shown to me at the time." Girard did not challenge these inconsistencies which were highly probative of the reliability of Mrs. Redmond's identification of Blackburn. Indeed, Girard may not have been fully aware of inconsistencies without the aid of the prior trial transcript. Clearly, the lack of prior transcript hampered, if not precluded, effective cross-examination of the key identifying witness.

The importance of Mrs. Redmond's testimony to the jury in reaching its decision cannot be gainsaid. All of the physical evidence linked *only* Zielinski to the crime. Moreover, Zielinski testified against Blackburn, as the jury was aware, only after pleading guilty to the armed robbery and in exchange for considerable benefits from the state — he would not have to serve his sentence in the Michigan Department of Corrections, where he feared for his life; he would not be charged as an habitual offender despite his lengthy criminal record; and a minimum sentence would be recommended by the state on the armed robbery conviction.

We cannot escape the conclusion that counsel's errors, in combination, effectively deprived Blackburn of a meaningful defense. The deficiencies left the only credible identifying witness's testimony virtually unchallenged and this court has taken occasion to express its grave reservations concerning the reliability of eyewitness testimony. *See, e.g., Wilson* v. *Cowan,* 578 F.2d 166, 168 (6th Cir. 1977). In this regard we mention that Mrs. Redmond's initial testimony, facially entitled to the greater belief, was that she saw Blackburn for less than a minute, and only in profile. Counsel's deficient performance further foreclosed the jury from hearing valuable countervailing evidence in the form of alibi witness testimony, Blackburn's own testimony, and/or Mrs. Redmond's prior inconsistent statements. Due to the combined errors of counsel, Blackburn was unable to subject the prosecution's case to " 'the crucible of meaningful adversarial testing' - the essence of the right to effective assistance of counsel." *Martin* v. *Rose,* 744 F.2d 1245, 1250 (6th Cir. 1984) (citing *United States* v. *Cronic,* 466 U.S. 648, 656 (1984)). The errors rendered the adversarial process and resulting conviction unreliable. *See Strickland,* 466 U.S. at 700.

One further factor should be taken into account. Far from being an open and shut case, the fact that the evidence against Blackburn was not overwhelming is clearly established by the fact that the jury was unable to reach a verdict at the first trial.

Under the circumstances of this case the errors were prejudicial because there is a reasonable probability that, absent the errors, the jury would have had a reasonable doubt regarding Blackburn's guilt. *Strickland*, 466 U.S. at 695. Accordingly, the judgment of the district court is reversed and the case is remanded to the district court with instructions to issue the writ of habeas corpus unless the State of Michigan grants Blackburn a new trial within a reasonable period of time.

APPENDIX C

MEMORANDUM OPINION AND ORDER

(United States District Court —
Eastern District of Michigan — Southern Division)

(Dated August 8, 1986)

(WILLIAM BLACKBURN, Petitioner, v. DALE FOLTZ, Respondent — CIVIL ACTION NO. 81CV-74147-DT; HONORABLE BARBARA HACKETT)

I.

Petitioner, William Blackburn, currently confined at the State Prison of Southern Michigan, has filed this application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner was initially tried on three counts of armed robbery, with the proceedings ending in a mistrial on September 26, 1977. On retrial on November 21, 1977, Petitioner was convicted on all three counts.

The Michigan Court of Appeals affirmed the convictions in an unpublished opinion dated January 9, 1980. (Docket No. 78-929). The Court held that Petitioner's Double Jeopardy rights were not violated by the second trial. Although Petitioner raised six additional issues on appeal, including an ineffective assistance of trial counsel claim, the Court of Appeals denied the remaining issues in a single sentence. The Michigan Supreme Court denied Petitioner's application for leave to appeal on November 19, 1980. (Docket No. 64671).

Petitioner raised five grounds for relief in his petition for writ of habeas corpus. On July 30, 1982, Judge Ralph B. Guy, Jr., formerly of this Court, ordered the petition

denied for lack of merit on four of the grounds and ordered an evidentiary hearing held on the issue of whether Petitioner was denied the effective assistance of counsel at trial. That issue was then referred for a report and recommendation. 28 U.S.C. § 636(b)(1)(B).

Petitioner claims his trial counsel erred in several aspects of trial: (1) His attorney failed to file a notice of alibi prior to his second trial, even though he advised trial counsel of the names of alibi witnesses. (2) His attorney failed to move to prohibit reference to two of Petitioner's three prior criminal convictions, which, in effect, prohibited him from testifying at trial in his own defense. (3) His attorney failed to move for a copy of the transcript of his first trial in order to impeach the major prosecution witness who provided an identification of Petitioner at both trials.

An evidentiary hearing on the ineffective assistance of counsel issue was held on September 21, 1982, before Magistrate Stephen Rhodes of this Court. On October 8, 1982, Respondent filed a motion to dismiss, claiming that Petitioner's failure to request evidentiary hearing in the state trial court on the ineffective assistance claim constituted a procedural default and precluded federal habeas corpus review under *Engle* v. *Isaac*, 456 U.S. 107 (1982). Magistrate Rhodes filed a report and recommendation on March 21, 1985, suggesting the denial of Respondent's motion to dismiss and of Petitioner's habeas application. Respondent filed no objections to the Magistrate's report, thus waiving any right of appeal. *See United States* v. *Walters*, 638 F.2d 947 (6th Cir. 1981). Accordingly, this Court now adopts the Magistrate's recommendation denying the motion.

Petitioner, however, did file timely objections to the report.[1] Thus, this Court must make a *de novo* determination of Petitioner's claims. *United States* v. *Shami*, 754 F.2d 670 (6th Cir. 1985); 28 U.S.C. § 636(b).

II.

A. Petitioner first contends that he was denied his constitutional right to the effective assistance of trial counsel because counsel deprived him of an alibi defense by failing to investigate alibi witnesses and by failing to file a notice of alibi. In order to establish ineffective assistance of counsel, a petitioner must first show that counsel's performance was deficient, i.e. that counsel was not functioning as counsel guaranteed by the Sixth Amendment, and that the deficient performance prejudiced the defense so as to deprive Petitioner of a fair trial. *Strickland* v. *Washington*, 446 U.S. 668 (1984). Judicial scrutiny of a counsel's performance must be highly deferential. *Strickland*, 466 U.S. at 689. Because of the difficulties of assessing counsel's performance, a reviewing court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance: that is the [Petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689. Petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 691.

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[1] The time for Petitioner to file objections was ultimately extended, for various reasons, to February 7, 1986. Petitioner's counsel attempted to file objections on that date, but they were rejected for being over twenty pages pursuant to Local Rule 7. The same objections, however, were filed three days later "because they do not fall strictly into [the] type of pleading" addressed under the Rule. *See* Petitioner's Objections, filed February 10, 1986. Under these circumstances, the objections will be considered timely.

Petitioner was charged with robbing the home of the Redmond family on West Drayton in Ferndale. Larry Girard was appointed defense counsel immediately prior to the preliminary examination, and represented Petitioner during both of the trials. Girard testified at the evidentiary hearing that Petitioner initially claimed that he was in Chicago on February 17, 1976, the date of the incident. Counsel, however, could find nothing to corroborate this story. Petitioner testified that he subsequently remembered he was in Detroit at the time. He stated that he supplied counsel with the names of three potential alibi witnesses: "Bill" the bartender at the Camelot Bar, Guy Reed, and William Campbell. Petitioner stated that he told Girard that his mother would also help with the alibi defense. Girard testified that he went to the Camelot Bar in the "Cass Corridor," to investigate the defense, however no-one would co-operate. He also noted that Petitioner's mother was unable to supply any useful information.

This Court notes that counsel made a reasonable effort to obtain information concerning the bartender and Guy Reed, especially in light of the fact that Petitioner could not supply complete addresses or names for these "witnesses." Girard, however, had apparently received a letter from Petitioner approximately twelve days prior to trial containing phone numbers where Campbell could be reached. The letter was found in Girard's file. (Hr. Tr. 122-126). Girard could not recall investigating Campbell as a possible alibi witness. Campbell did not testify at either trial.

As stated in *Strickland, supra,* 446 U.S. at 691: "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." An otherwise admirable

defense will not excuse the failure to adequately investigate. *Keys* v. *Duckworth*, 761 F.2d 390, 392 n. 3 (7th Cir. 1985). Accordingly, "[i]t is axiomatic that a defense counsel must interview witnesses to the crime and alibi witnesses." *United States ex.rel. Harris* v. *Reed*, 608 F. Supp. 1369, 1381 (N.D. Ill. 1985); *Hawkman* v. *Pratt*, 661 F.2d 1161 (8th Cir. 1981).

Assuming Girard to be ineffective because of his failure to investigate Campbell, however, does not necessarily mean that Petitioner is entitled to relief. He must establish a reasonable probability that he was harmed by the failure to call the witness, and that the result of the trial would have been different. *Weeks* v. *Scurr*, 608 F.Supp 884 (W.D.Mo. 1985). As stated in the concurrance by Justice Blackman in *Nix* v. *Whiteside*, 106 S. Ct. 998, 1004 (1986), "The touchstone of a claim of prejudice is an allegation that counsel's behavior did something to 'deprive the defendant of a fair trial, a trial whose result is reliable.'" As stated by the majority in *Nix*, the defendant need not establish that it is more likely than not that the outcome would have been altered, but merely that there is a reasonable probability that it would have been. *Nix*, 106 S. Ct. at 999.

Balancing Campbell's potential testimony against the prosecutor's case, this Court finds that defense counsel's failure to produce Campbell did not prejudice Petitioner. Campbell testified at the hearing that he saw Petitioner in the vicinity of the Camelot Bar on the morning of February 17, 1976. Thus, Petitioner argues, he could not have been in Ferndale committing the robbery. There are, however, some problems with Campbell's claim. He testified that he did not recall seeing Petitioner on that morning until he was "called" by Petitioner's mother "a

long time" after Petitioner's arrest. (Hr. Tr. II 19).[2] Likewise, Campbell was the only person who claimed to have seen Petitioner that morning. There were no other alibi witnesses to corroborate Campbell's story. These factors weaken the reliability of Campbell's testimony.

The prosecution's case against Petitioner rested primarily on the testimony of Anthony Zielinski, a co-defendant who pled guilty to the robbery. Zielinski stated that he, Petitioner and Joe May were involved in the crime. Petitioner and Zielinski apparently wore ski masks and committed the actual robbery. Zielinski testified extensively as to Petitioner's involvement. (Tr. 362-441). Petitioner was likewise identified by the complainant, Raymonde Redmond. (Tr. 118-119).

While recognizing that there are certain problems with accomplice testimony, this Court finds that in light of Zielinski's "evidence" there is no "reasonable probability" that the result of the trial would have been affected by Campbell's alibi testimony. *Nix, supra. Cf. Wilson* v. *Cowan,* 578 F.2d 166 (6th Cir. 1978) (habeas relief granted where counsel failed to investigate an alibi witness and the prosecution's entire case consisted of the tenuous identification testimony of two witnesses). Petitioner's first claim is without merit.

B. Petitioner next contends that defense counsel should have moved to suppress his prior convictions. Petitioner had been convicted in 1945 for larceny in a building, in 1948 for armed robbery, and in 1977 for aiding and abetting the carrying of a concealed weapon. He claims that the failure to suppress these convictions kept him from testifying at trial.

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[2] Petitioner's mother apparently telephoned Campbell "months" after Petitioner arrest. (Hr. Tr. II 20).

Girard testified at the hearing that Petitioner had informed him at the beginning of his appointment that he was not going to take the witness stand. (Hr. Tr. 80). Counsel also stated that he informed Petitioner prior to trial of his concern that if Petitioner testified, Joe May would be produced as a rebuttal witness by the prosecution. (Hr. Tr. 116). Counsel acknowledged that prior convictions should usually be suppressed, but under the instant circumstances, he thought it unnecessary to attempt to suppress those of Petitioner. (Hr. Tr. 80).

Girard clearly did not think a motion to supress was necessary. His decision under the circumstances was part of a deliberate and reasonable trial strategy. *Strickland, supra.* This Court notes that even if Girard had filed a motion to supress, it is probable that the most recent conviction would have been allowed for impeachment purposes. *People* v. *Woods,* 416 Mich. 581, 331 N.W.d 707, *cert. denied,* 462 U.S. 1134 (1982). Petitioner merits no relief on his second claim.

C. Petitioner last claims that Girard failed to obtain a transcript of the testimony of the complainant, Raymond Redmond, from the first trial for use as impeachment during the second trial. Counsel testified that he had moved, at Petitioner's request, for a copy of the testimony prior to the second trial, but the trial court denied the motion. (Hearing Tr. 117-118).

Counsel further stated that:

> I had taken rather copious notes of Mrs. Redmun's [sic] testimony, and I was of the impression that if Mrs. Redmun changed her testimony at the second trial from that of the first trial it would have been favorable to the defense. . . . She broke down on the witness

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> stand on several occasions during the first trial, and she was confusing herself, and [she] accused me of attempting to confuse her. I felt relatively comfortable prior to the commencement of the second trail . . . [that] . . . Mrs. Redmun's testimony would not be as damaging to Mr. Blackburn as it was in the first trial.

(Hr. Tr. 98-99). Girard noted that Mrs. Redmond's testimony at the second trial was not different from that of the first. (Hr. Tr. 101).

A review of the transcript of the second trial indicates that Girard emphasized the weaknesses in the identification testimony. (Tr. 179-189, 201-203).[3] Since the testimony at both trials was substantially the same, it is unlikely that impeachment based on the actual transcript would have been helpful. *See* Transcripts dated September 19 and 26, 1977 and November 14-21, 1977. Girard attempted to point out the weaknesses in both Zielinski's and Redmond's testimony. While such an approach was unsuccessful, Girard's representation was not ineffective under the *Strickland* standard. Accordingly,

IT IS ORDERED that the petition for writ of habeas corpus is DENIED.

/s/ HONORABLE BARBARA HACKETT
UNITED STATES DISTRICT JUDGE

DATED: August 8, 1986

(Certification Omitted)

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[3] Redmond appeared confused concerning the clothing worn by the assailants and distraught in general.

APPENDIX D

MAGISTRATE'S REPORT AND RECOMMENDATION

(United States District Court —
Eastern District of Michigan — Southern Division)

(Entered March 21, 1985)

(WILLIAM BLACKBURN, Plaintiff, v. DALE FOLTZ, Defendant — CIVIL ACTION NO. 81-74147; HONORABLE RALPH B. GUY, JR.)

I.

Petitioner, William Blackburn, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Blackburn was initially tried on three counts of armed robbery, with the proceedings ending in a mistrial on September 26, 1977. On retrial, Blackburn was convicted on all three counts on November 21, 1977.

The Michigan Court of Appeals affirmed Blackburn's convictions in an unpublished opinion dated January 9, 1982. *People* v. *William Blackburn,* Mich. Ct. App. Docket No. 78-929. The court held that double jeopardy rights were not violated by the second trial. Although Blackburn raised six additional arguments on appeal, including an allegation of ineffective assistance of trial counsel, the Court of Appeals addressed the remaining issues in a single sentence: "The remaining allegations raised by defendant are of little merit and do not warrant our further consideration." The Michigan Supreme Court denied Blackburn's application for leave to appeal on November 19, 1980. *People* v. *William Leonard Blackburn,* Mich. S. Ct. Docket No. 64671.

Blackburn raised five grounds for relief in his petition for habeas corpus relief. On July 30, 1982, the District Judge Ralph B. Guy, Jr., ordered the petition denied for lack of merit on four of the grounds alleged in the petition, and ordered an evidentiary hearing held on the issue of whether petitioner was denied the effective assistance of counsel at trial. That issue was then referred for a report and recommendation. 28 U.S.C. § 636(b)(1)(B).

Blackburn claims his trial counsel erred in several aspects of trial: (1) His attorney failed to file a notice of alibi prior to his second trial, even though, he claims, he advised trial counsel of the names of alibi witnesses. (2) His attorney failed to move to prohibit reference to two of petitioner's three prior criminal convictions, which, in effect, prohibited him from testifying at trial in his own defense. (3) His attorney failed to move for a copy of the transcript of his first trial in order to impeach the major prosecution witness who provided an identification of Blackburn at both trials.

An evidentiary hearing on the ineffective assistance of counsel issue was held on September 21, 1982. Following this hearing, the parties submitted briefs regarding the merits of petitioner's claim of ineffective assistance of trial counsel.

On October 8, 1982, respondent filed a motion to dismiss, or in the alternative, motion to amend his answer to the petition, claiming that Blackburn's failure to request an evidentiary hearing or to move for a new trial in the trial court following his conviction constitutes procedural default and precludes federal habeas corpus review under the recent Supreme Court decision in *Engle* v. *Issac*, 456 U.S. 107, 102 S. Ct. 1558, 1571

L.Ed.2d 783 (1982), *reh'g denied*, 456 U.S. 1001 (1982), *reh'g denied*, 457 U.S. 1141 (1982).

Herein, the motion to dismiss will be addressed first, then the petition itself will be discussed.

II.

In *Engle*, the Supreme Court held that where a federal habeas corpus petitioner failed to make a contemporaneous objection to the trial court's jury instructions pursuant to an Ohio Rule of Criminal Procedure, the petitioner was precluded from raising the alleged error in a federal habeas corpus proceeding absent a showing of cause excusing the failure to object and actual prejudice which resulted from the error. 102 S. Ct. at 1572. The *Engle* decision relied on the Supreme Court's decision in *Wainwright* v. *Sykes*, 433 U.S. 72, 97 S. Ct. 2497 53 L.Ed.2d 594 (1977), *reh'g denied*, 434 U.S. 880 (1977). In *Wainwright*, the Court noted that the decisions of trial counsel relating to trial strategy, even when made without the consultation of the defendant, preclude direct federal review of unobjected-to-claims, except in "exceptional" circumstances. *Id.* at 91 n. 14, 97 S. Ct. at 2508 n. 14. [1]

The respondent claims in his motion that Blackburn has procedurally defaulted on the issue of competence of his trial counsel by failing to bring a motion for new trial or request an evidentiary hearing before the state trial court. In support of his claim, respondent cites *People* v. *Ginther*, 390 Mich. 436; 212 N.W. 2d 922 (1973), in which the Michigan Supreme Court stated:

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[1] The majority opinion did not directly address the issue of raising trial counsel's competence in order to meet the requirements of procedural default. However, Justice Brennan stated in dissent: "as a practical matter, a trial counsel cannot procedurally waive his own inadequacy." 433 U.S. at 118, 97 S. Ct. at 2523.

> Whether Ginther had a viable intoxication defense and whether the representation he received from his assigned lawyer was adequate depends on facts not of record. 'A convicted person who attacks the adequacy of the representation he received at his trial must prove his claim. To the extent his claim depends on facts not of record, it is uncumbent [*sic*] on him to make a testimonial record at the trial court level in connection with am otion [*sic*] for a new trial which evidentially supports his claim and which excludes hypotheses consistent with the view that his trial lawyer represented him adequately.'

390 Mich. at 442-443, *quoting People* v. *Jelks*, 33 Mich. App. 425, 431; 190 N.W. 2d 291 (1971).

In *Court of Ulster County* v. *Allen*, 442 U.S. 140 (1979), the court held that the *Sykes* rules does not apply when it is not clear that the state appellate court applied the procedural bar. When the state appellate court ignored the procedural bar, and addressed the merits of the issue, the federal court may likewise hear the issue in a habeas corpus proceeding.

On the other hand, the federal court is precluded from hearing an issue as to which the state appellate court applied the procedural bar. *Walker* v. *Ingle*, 703 F.2d 959 (6th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 367, 396 (1983); *Hockenbury* v. *Sowders*, 620 F.2d 111 (6th Cir. 1980), *cert. denied*, 450 U.S. 933 (1981).

In *Hockenbury, supra*, it was noted that whether the state appellate court reviewed the constitutional issue or refused to review it due to the procedural default is critical, and a difficult issue when the state appellate court arguably did both. Nevertheless, it was indicated

that the federal court must determine whether the petitioner's failure to comply with the contemporaneous objection rule was a substantial basis of the appellate court's denial of the claim.

In *Raper* v. *Mintzes*, 706 F.2d 161 (6th Cir. 1983), the court held that where the state did not raise the petitioner's procedural default in its appellate brief and the appellate court did not specifically state that the procedural default was the basis for its judgment, then *Sykes* does not apply. *See also: Meeks* v. *Bergen*, 749 F.2d 322 (6th Cir. 1984).

In the present case, the judgments of the Michigan Court of Appeals and the Michigan Supreme Court do not reflect whether substantive consideration was given to Blackburn's ineffective assistance of counsel claim, or whether the claim was rejected due to his failure to raise the issue at the trial court level. Thus, *Raper, supra,* requires this Court to examine the state's appellate brief to determine whether Blackburn's procedural default was argued.

A review of the state's brief in the Michigan Court of Appeals indicates that the state did not argue Blackburn's failure to raise this issue at the trial court level in support of its position that his sentence should be affirmed. Rather, the state argued at length that the trial court record was adequate in demonstrating that Blackburn was not denied the effective assistance of counsel. (*People* v. *Blackburn*, Appellee's Brief, page 20-25)

In this regard, it is noted that following *Ginther, supra,* the Michigan Court of Appeals has on occasion considered an ineffective assistance of counsel claim, even when the claim was not first raised in the trial

court, when the court concludes that there is sufficient information of record upon which to judge the claim. *People* v. *Krokker*, 83 Mich. App. 474, 477 (1978); *People* v. *Means*, 97 Mich. App. 641 (1980).

Thus, it must be concluded that it is reasonably clear that the Michigan appellate courts did not rely upon Blackburn's procedural default in rejecting his ineffective assistance of counsel claim. Accordingly, it is recommended that the respondent's motion to dismiss on this ground be denied.

III.

A. In *Strickland* v. *Washington*, __ U.S. __, 104 S. Ct. 2052 (1984), the court held that to establish a claim of ineffective assistance of counsel, it must be shown (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. The Supreme Court stated that in giving meaning to the Sixth Amendment's requirement of effective assistance "we must take its purpose — to ensure a fair trial — as a guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 2064.

Strickland sets forth general guidelines to be followed in determining whether counsel's performance was deficient. The proper measure of attorney performance is an objective standard of reasonableness under prevailing professional norms. *Id.* at 2065. Moreover, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 2066.

The Supreme Court further stated that a court evaluating a claim of ineffective assistance of counsel should indulge this presumption, and make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 2065.

Finally, the Supreme Court noted counsel's duty to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. *Id.* at 2065. Also described was counsel's duty to make reasonable investigations. *Id.* at 2066.

B. Given this standard, it must be concluded that Blackburn's claim of ineffective assistance of counsel lacks merit. With respect to his claim that his counsel deprived him of a substantial alibi defense by failing to file the required notice of alibi and by failing to investigate the alibi witnesses, the testimony at the hearing reflects that his trial counsel did make a fair attempt to locate alibi witnesses but was unable to do so. Blackburn had referred counsel to his mother for help in this regard, but counsel indicated that his mother was no help. One perspective alibi witness, Joe May, had confessed to the crime and implicated the petitioner. Other witnesses, who Blackburn indicated could be found in the vicinity of the Camelot Bar on the Cass Corridor could not be located when counsel attempted to find them there.

Trial counsel testified that he had concluded that a weak alibi defense would be detrimental to his client and the lack of evidence supporting the alibi made the defense questionable from an ethical standpoint.

In these circumstances, it must be concluded that trial counsel's investigation of the alibi defense, and decision not to present it, was reasonable in the circumstances and did not deprive the petitioner of a fair trial.

C. The petitioner further contends that his counsel should have moved to suppress his prior convictions. The petitioner had been convicted in 1945 for larceny in a building, in 1948 for armed robbery, and in 1977 for aiding and abetting carrying a concealed weapon in an automobile. His first two convictions were without counsel. Thus, there is substantial merit to Blackburn's argument that if such a motion to suppress had been made, his 1945 and 1948 convictions would have been suppressed not only because they were without counsel, *Loper* v. *Beto*, 405 U.S. 473 (1972), but also because they were relatively old. *People* v. *Jackson*, 391 Mich. 323 (1974); *People* v. *Robinson*, 79 Mich. App. 145 (1977); *People* v. *Penn*, 71 Mich. App. 517 (1976).

Nevertheless, it is equally clear that the prosecutor would quite likely have been permitted to use the 1977 weapons conviction for impeachment purposes.

At the hearing, counsel indicated that he did not move to suppress these convictions because prior to trial, the petitioner indicated his intent not to testify and because he concluded the motion would be futile.

Again, it must be concluded that this judgment on counsel's part was not so unreasonable as to deprive the petitioner of a fair trial. The relative lack of prejudice is demonstrated in the likelihood that even if the motion were filed, it would have been denied in part and Blackburn would still be faced with the prospect of impeachment by prior record if he chose to testify.

D. Finally, Blackburn alleges ineffective assistance of counsel in his attorney's failure to obtain the prior

testimony of the complaining witness, Raymonde Redmond. Nevertheless, it must be concluded that counsel's cross-examination of this witness was vigorous and skillful in that numerous inconsistencies in her prior testimony were brought out. It is not clear at all that the cross-examination could have been any more effective if counsel had had this transcript. Moreover, he had his detailed notes of the prior testimony and the transcript of her preliminary examination testimony. Finally, it is noted that on each of several occasions prior to this trial, the witness positively identified Blackburn; this suggests that any further attempted impeachment based on the actual transcript would have been futile.

E. In conclusion, it cannot be concluded that counsel's performance was deficient or that his performance prejudiced the defense, as required pursuant to *Strickland* v. *Washington*. Simply stated, counsel's conduct did not so undermine the proper functioning of the adversarial process that the trial could not be relied upon as having produced a just result.

Accordingly, it is recommended that the petition for writ of habeas corpus be denied.

The parties are advised that any objections to this Magistrate's Report and Recommendation must be filed within ten (10) days. Otherwise, any appeal from this Court's judgment is waived.

/s/ STEVEN W. RHODES
United States Magistrate

Entered: 21 MAR. 1985

(Certification Omitted)

APPENDIX E

ORDER DENYING LEAVE TO APPEAL OR OTHER RELIEF

(State of Michigan — Supreme Court)

(Certified November 11, 1980)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v WILLIAM LEONARD BLACKBURN, Defendant-Appellant — SC: 64761; CoA: 78-929; LC: 77-31669-FY)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 19th day of November in the year of our Lord one thousand nine hundred and eighty.

Present the Honorable:

MARY S. COLEMAN, Chief Justice; THOMAS GILES KAVANAGH, G. MENNEN WILLIAMS, CHARLES L. LEVIN, JOHN W. FITZGERALD, JAMES L. RYAN, BLAIR MOODY, JR., Associate Justices.

The Court of Appeals decision dated January 9, 1980, the Court of Appeals record, and the trial court record have been considered by the Court, pursuant to a letter request of the defendant under Administrative Order 1977-4, 400 Mich lxvii, to determine whether leave to appeal or other relief should be granted by this Court.

The Court is not persuaded that relief should be granted and it is therefore DENIED.

(*Certification Omitted*)

APPENDIX F

OPINION

(State of Michigan — Court of Appeals)

(Submitted November 6, 1979, at Lansing)
(Decided January 9, 1980)

(PEOPLE v BLACKBURN — Docket No. 78-929; 94 MICH APP 711)

Before: R. M. MAHER, P.J.;
and MACKENZIE, and J. H. PIERCEY,* JJ.

PER CURIAM

Defendant was convicted of three counts of armed robbery, MCL 750.529; MSA 28.797, by an Oakland County Circuit Court jury. He was sentenced to 60 to 90 years imprisonment on one count and life imprisonment on each of the other two counts, the sentences to run concurrently. From these convictions and sentences, defendant appeals as of right.

The first trial on these charges was dismissed when the jury indicated that it could not reach unanimous agreement and defense counsel moved for a mistrial. Now, defendant argues that his double jeopardy rights were violated by the second trial. Defendant maintains that there was no manifest necessity for the mistrial; instead, the trial court forced it by refusing to honor a legitimate jury request for a rereading of the transcript. Further, defendant contends that the fact that defense counsel approved and/or requested a mistrial is of no significance since the record fails to indicate that

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* Circuit judge, sitting on the Court of Appeals by assignment.

defendant himself played any role in consenting to his counsel's actions.

Once a jury is empaneled and sworn a defendant is placed in jeopardy. *United States* v *Jorn*, 400 US 470, 479; 91 S Ct 547, 554; 27 L Ed 2d 543, 553 (1971), *People* v *Gardner*, 37 Mich App 520; 195 NW2d 62 (1972). When a defendant has been placed in jeopardy, he has a right to have his guilt weighed finally by that tribunal. Unless he consents to the trial's interruption, or a mistrial occurs because of manifest necessity, the state is precluded from bringing him to trial again. *People* v *Alvin Johnson*, 396 Mich 424; 240 NW2d 729 (1976).

The doctrine of manifest necessity allows a trial judge to declare a mistrial when a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings. See *United States* v *Dinitz*, 424 US 600, 607; 96 S Ct 1075; 47 L Ed 2d 267 (1976), and *People* v *Williams*, 85 Mich App 258, 262-263; 271 NW2d 191 (1978). We review this trial court determination, then, under an abuse of discretion standard, *People* v *Robertson*, 87 Mich App 109; 273 NW2d 501 (1978).

The record of the first trial reveals that after deliberating for a short time the jury indicated they were "hopelessly deadlocked". The trial judge urged agreement if at all possible, with due respect for the rights of the people and the defendant, and sent the jury back for further deliberation. Shortly thereafter, the jury returned with a request for a rereading of the testimony of certain witnesses. The court replied:

> "The answer to that is to read back only certain portions of testimony is not allowed, it is

> improper and the reason is that emphasizes certain portions of testimony and might deemphasize others. To get the entire transcript it would take as long to prepare that as it took to try the case. Obviously, the reporter would have to type it and take more than a week to do it. I cannot have just portions of the testimony transcribed."

Thereafter, when the jury still could not reach agreement after a third round of deliberations, defense counsel moved for, and the trial court declared, a mistrial.

Reserving the question of the effect of defense counsel's motion, we hold the trial court abused its discretion in declaring a mistrial on manifest necessity grounds. Although the failure of a jury to reach a verdict has been held sufficient to establish a manifest necessity in some circumstances, see *United States* v *Perez*, 22 US (9 Wheat) 579; 6 L Ed 165 (1824), such a ruling is not in order on the facts of this case.

In *People* v *Howe*, 392 Mich 670; 221 NW2d 350 (1974), a similar situation was presented. There, the jury requested that the testimony of two witnesses be read back. The trial judge refused this request on the basis that to give jurors bits of testimony puts too much emphasis on it. In reversing the trial court, the Supreme Court in *Howe* stated:

> "A trial court must exercise its discretion to assure fairness and to refuse unreasonable requests; but, it cannot simply refuse to grant the jury's request for fear of placing too much emphasis on the testimony of one or two witnesses." 392 Mich at 676.

Just as in *Howe*, the instant trial judge did not indicate that he thought the request was unreasonable. Neither did he ask the jury to resume deliberations with the knowledge that their request would again be reviewed if the jury members continued to find it necessary to rehear certain testimony. Accordingly, just as in *Howe*, we find the trial judge abused his discretion by failing to properly consider what appears to have been a reasonable request on the part of the jury. See also *People* v *Bloom*, 76 Mich App 405, 409; 257 NW2d 105 (1977).

As stated above, however, this does not end our inquiry. The state is not barred from reprosecution when a mistrial is declared out of manifest necessity *or* upon defendant's consent. See *Alvin Johnson*, *supra*, 431. Defendant now argues that he never personally consented to the motion for mistrial made in his behalf by defense counsel.

An identical claim was raised in *People* v *Hoffman*, 81 Mich App 288; 265 NW2d 94 (1978). The *Hoffman* Court surveyed the case law in this area and concluded that the concurrence by defense counsel in a prosecutorial motion for mistrial effectively eliminated the bar of double jeopardy. Moreover, in *Hoffman*, although this Court encouraged trial courts to elicit the express consent of defendants to mistrials, it did not believe that the absence of a defendant's personal consent necessarily reflected the absence of his primary control over the proceedings. We are in accord with these conclusions. Accordingly, we find that defendant's second trial was not barred by double jeopardy. The remaining allegations raised by defendant are of little merit and do not warrant our further consideration.

Affirmed.

R. M. MAHER, P.J. *(dissenting)*

I must dissent from the result reached by the majority on the issue of double jeopardy. For the reasons stated in my concurring opinion in *People* v *Hoffman*, 81 Mich App 288; 265 NW2d 94 (1978), I read *People* v *Alvin Johnson*, 396 Mich 424; 240 NW2d 729 (1976), to require a personal manifestation by the defendant that he or she consents to a waiver of the protection against double jeopardy. The record herein does not disclose a statement to that effect by the defendant, nor a demonstration that defense counsel consulted with his client prior to making his motion for a mistrial. I would therefore hold that reprosecution of the defendant is barred by the constitutional prohibition of double jeopardy.

I would reverse.